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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

RODWIN YAMSONE VIBAT,

Defendant and Appellant.

C087066

(Super. Ct. No.
CRF-2016-4928)

Defendant Rodwin Yamsone Vibat, a massage therapist, was convicted of charges related to inappropriate touching of three victims during massages. On appeal, defendant contends he was improperly convicted of both simple battery and misdemeanor sexual battery; the People concede. The People also agree with defendant's contention that there was insufficient evidence to support one of his convictions for felony sexual battery by misrepresentation of professional purpose. Defendant further argues there was

insufficient evidence to support one of his convictions for misdemeanor sexual battery. Finally, he contends that the jury instruction given by the trial court for simple battery was unconstitutionally vague as applied to the facts of this case.

We will reverse the conviction for sexual battery by misrepresentation, strike two of defendant's simple battery convictions, and remand the matter for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

1. *R.H. (counts 1 and 4)*

R.H. received five or six massages from defendant during 2013, 2014, and 2016. During two of the massages between 2013 and 2014, defendant put his hands between her breasts when he was massaging her chest. Although R.H. felt uncomfortable, she did not say anything at the time because she was unsure if the touching was accidental.

In August 2016, R.H. received another massage from defendant. R.H. noticed that defendant's hand was brushing over her vagina during the massage. At one point, R.H. was lying on her back when defendant began rubbing her vagina over her underwear. Defendant pulled her underwear to the side and continued rubbing her vagina and genitals. Within seconds, defendant digitally penetrated her vagina. The inappropriate touching lasted five to 10 seconds. R.H. "immediately" realized this was not part of a legitimate massage and said, "[T]hat's enough"; defendant stopped and pushed her underwear back in place. R.H. froze and allowed defendant to finish the massage.

At the end of the appointment, R.H. said "that should not have happened." Defendant apologized and said the massage would be free. He explained that he "forgot [he] was at work." Defendant apologized again to R.H. via text messages, offering her free future massages.

Although R.H. initially hesitated, she eventually contacted the police a week after the incident. Two days later, R.H. participated in a pretextual telephone call. When R.H. asked about the prior massage, defendant apologized for touching her inappropriately but denied inserting his fingers into her vagina. He explained that he had been doing a

“lymphatic detox” and had become suddenly “consumed” by her “energy.” Defendant promised it would not happen again. A recording of the call was played for the jury.

Defendant was arrested the same day as the pretext call. He was only charged with respect to the final incident. The day of his arrest, defendant told police that he initially massaged R.H.’s vagina over her underwear and continued doing so after putting his hand inside her underwear. Defendant denied putting his fingers inside her vagina. Defendant said he had been “consumed by the energy,” but he stopped when he realized what he was doing. Defendant told police that massage clients had previously complained about inappropriate touching, but he had never massaged a client’s vagina before. During trial, two other individuals testified that defendant touched them inappropriately during massages. A recording of defendant’s police interview was played for the jury.

2. *P.H. (counts 2 and 5)*

P.H.’s first massage with defendant in April 2016 was uneventful. During a second massage later that month, P.H. was lying on her back while defendant worked on her shoulders. Defendant began running his hands down the sides of her ribcage to her hips. He suddenly encircled her breasts with his hands twice, and then put his hands over the top of her breasts. He grabbed her nipples, pinched them, and pulled them up. Defendant then let go and said he was done.

P.H. froze and did not say anything. She got dressed, paid for the massage, and left. P.H. testified at trial that defendant had a look on his face as though he had “done something really, really bad and was in trouble.”

3. *H.C. (counts 3 and 6)*

H.C. was friends with defendant and received approximately 25 massages from him over four years. H.C. testified that defendant touched her inappropriately during three massages. Once, defendant touched the top of her breasts while she was lying on her back. He complied with H.C.’s request to stop. Another time, defendant touched the

outside of H.C.'s vagina while she was wearing shorts. The final time, defendant told her to stop talking while he was massaging her inner thighs. His arm got "way too close" to her labia majora. He also massaged her pubic bone, just above her vagina. H.C. told defendant to stop and then she left. H.C. testified at trial that each of the three incidents involved sexual touching. Defendant was only charged with respect to the final incident.

During cross-examination, H.C. testified that she could not remember whether defendant actually touched her labia majora during the final massage. When she spoke with police in August 2016, three months after the incident, she told police that defendant "reached to her vagina and touched her vagina." H.C. "immediately spoke up" and left. In another interview in November 2016, H.C. told police that defendant "got very close to her genitalia," occasionally "brush[ed] over the top of her genitalia," and massaged her pubic bone just above her genitalia. H.C. described the touching as sexual and nonaccidental. She testified during trial that events were fresh in her mind when she spoke with police, and she told them the truth.

4. *Jury verdict and sentencing*

In March 2018, a jury found defendant guilty of one count of sexual battery by misrepresentation of professional purpose as to R.H. (Pen. Code, § 243.4, subd. (c)—count 1),¹ two counts of simple battery as to P.H. and H.C. (§ 242—counts 2 and 3), and three counts of misdemeanor sexual battery as to R.H., P.H., and H.C. (§ 243.4, subd. (e)(1)—counts 4, 5, and 6).

In May 2018, the trial court suspended imposition of sentence and placed defendant on probation for four years.

¹ Undesignated statutory references are to the Penal Code.

DISCUSSION

I

Defendant contends the evidence is insufficient to support his conviction for sexual battery by misrepresentation of professional purpose as to R.H. (count 1). The People concede; we agree and will reverse the conviction.

“In reviewing the sufficiency of the evidence to support a criminal conviction, we review the record ‘ “in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citation.]’ [Citation.] We do not reweigh the evidence or revisit credibility issues, but rather presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. [Citation.]” (*People v. Pham* (2009) 180 Cal.App.4th 919, 924-925.)

A defendant commits sexual battery by misrepresentation of professional purpose by touching an intimate part of the victim for sexual purposes. In addition, at the time of the touching, the victim must be “unconscious of the nature of the act because the perpetrator fraudulently represented that the touching served a professional purpose.” (§ 243.4, subd. (c).) A victim need not be physically unconscious during the acts in question. (*People v. Pham, supra*, 180 Cal.App.4th at p. 928.) Rather, the prosecution must prove that the defendant “tricked the victim into submitting to the touching on the pretext it served a professional purpose. [Citation.] . . . So long as the victim was unaware of the ‘essential characteristics of the act,’ i.e., the sexual nature of the act itself, the unconsciousness requirement will be satisfied.” (*Ibid.*; see also *People v. Stuedemann* (2007) 156 Cal.App.4th 1, 8 [finding evidence was insufficient to support a conviction under the unconsciousness provisions of former § 288a, subd. (f)(3) or § 289, subd. (d)(3) because the victim “immediately recognized the [sexual] acts for what they were and expressed her nonconsent”].)

The evidence at trial indicated R.H. immediately recognized the sexual nature of defendant's actions and expressed her nonconsent. R.H. testified that she realized that defendant was acting inappropriately and not legitimately massaging her when he touched her vagina and digitally penetrated her. She instructed defendant to stop. Under these circumstances, the evidence is insufficient to support the finding that defendant committed sexual battery by misrepresentation of professional purpose.

II

Defendant contends the evidence is insufficient to support his conviction for misdemeanor sexual battery against H.C. as charged in count 6. He claims the evidence failed to establish that he touched H.C.'s sexual organ. Defendant notes that H.C. could not remember during trial whether he touched her genitalia, and characterizes her statement to police in November 2016 that he "brush[ed] over the top of her genitalia" as vague. We disagree.

A defendant is guilty of sexual battery if he "touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse." (§ 243.4, subd. (e)(1).) " '[T]ouches' " is defined for purposes of sexual battery as "physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim." (*Id.* at subd. (e)(2).) " 'Intimate part' " is defined as "the sexual organ, anus, groin, or buttocks of any person, and the breast of a female." (*Id.* at subd. (g)(1).)

Although H.C. could not remember during trial whether defendant actually touched her labia majora during the final incident, a jury could reasonably infer that defendant did so. H.C. told police in November 2016 that defendant "got very close to her genitalia" during the massage and occasionally "brush[ed] over the top of her genitalia" in a sexual and nonaccidental manner. Moreover, she told police in August 2016 that defendant "reached to her vagina and touched her vagina." H.C. testified

during trial that events were fresh in her mind when she spoke with police, and she told them the truth. In sum, substantial evidence supports the jury's verdict of sexual battery as charged in count 6.

III

Defendant argues he cannot be convicted of both misdemeanor sexual battery (counts 5 and 6) and misdemeanor simple battery (counts 2 and 3), as the latter is a lesser included offense of the former. The People concede, and we agree. (See *In re Keith T.* (1984) 156 Cal.App.3d 983, 988 [battery is a necessarily included offense to sexual battery].) We will strike defendant's misdemeanor simple battery convictions.

Given our conclusions regarding counts 3 and 6, we need not reach defendant's argument that the trial court's instruction for simple battery (CALCRIM No. 960) was unconstitutionally vague, regardless of whether he waived the issue by failing to raise it during trial.

DISPOSITION

The judgment is modified to reverse the conviction on counts 1 (sexual battery by misrepresentation of professional purpose) and to strike the convictions on counts 2 and 3 (misdemeanor simple battery). The judgment is otherwise affirmed. The matter is remanded for resentencing.

KRAUSE, J.

We concur:

BUTZ, Acting P. J.

HOCH, J.